

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILBERT FILOGONIO MAGDALENO,

Defendant and Appellant.

B187376

(Los Angeles County
Super. Ct. No. TA075238)

APPEAL from a judgment of the Superior Court of Los Angeles County.
John T. Doyle, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., Joseph P. Lee and April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Wilbert Filogonio Magdaleno (Magdaleno) of attempted first degree murder pursuant to Penal Code sections 664, 187, subdivision (a) and 189.¹ Additionally, the jury found true the allegation that the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A), and that Magdaleno discharged a firearm, causing great bodily injury, within the meaning of section 12022.53, subdivision (d). Magdaleno was sentenced to 40 years to life imprisonment. Specifically, he was given 15 years to life for attempted first degree murder and an additional 25 years to life for the firearm enhancement under section 12022.53, subdivision (d).² On appeal, Magdaleno contends that his constitutional rights were violated because: (1) his conviction was based on an identification that was the product of a suggestive photographic lineup; and (2) he was denied an opportunity to confront witnesses who provided hearsay statements that supported the gang allegation.

We find no error and affirm.

FACTS

Magdaleno's tattoos

Magdaleno has “Eastside Paramount” or “Eastside Paramount 13” or “ESP 13” tattooed on his abdomen, chest, arm and the web of his right hand. Also, he has a similar gang tattoo above his right eyebrow. According to the People’s gang expert, when a gang member has a facial tattoo it means he is a “hard charging soldier.” The tattoo is public; it cannot be hidden.

The shooting

Guillermo Perez (Perez) was visiting his mother on January 18, 2004. While talking to his cousin across the street, Perez heard something that sounded like rocks

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² According to Magdaleno and the People, sentence on the base count was a minimum of 15 years due to the gang enhancement.

being thrown against metal. He went to investigate. He saw an old friend named Enrique Pena (Pena). A second person Perez had never seen before appeared and asked, “Where are you from?” Perez said he was from “nowhere.” The second person asked Perez what he was doing in the neighborhood, and Perez said that he was visiting his mother. The second person said, “This is Minor, Eastside Paramount,” and shot Perez in the chest and abdomen.

The preliminary hearing

Perez

Perez was asked to identify the person he saw at the shooting. He pointed to Magdaleno who was wearing an orange jumpsuit.

Perez testified that he went to a live lineup but did not identify anybody because he was afraid for his family and himself. In fact, he recognized Magdaleno right away. No one threatened Perez to get him to testify. He testified because he did not want anyone else to get shot.

On cross-examination, Perez stated that the shooter was bald and looked to be in his late 20’s or early 30’s. He did not have any facial hair, nor did he have long sideburns. On redirect, Perez squinted when he approached Magdaleno to take a closer look. Perez was asked if he has a vision problem and said no. He explained that “the light reflects in my eyes.”

Deputy Rod Barton

Los Angeles County Deputy Sheriff Rod Barton testified that he arrested a man named Pablo Saldivar (Saldivar) for possession of marijuana. Saldivar voluntarily told Deputy Barton that he saw Minor (Magdaleno) from Eastside Paramount shoot Perez. Saldivar had prior interaction with Magdaleno. Magdaleno had tried to recruit Saldivar into Eastside Paramount.³

The trial court found probable cause to bind Magdaleno over for trial for attempted, premeditated murder.

³ Saldivar testified at the preliminary hearing and denied seeing who shot Perez.

The trial

Saldivar

Saldivar was the first witness called. According to Saldivar, he heard shots on the evening of January 18, 2004, but he did not see anything. He admitted that previously he told Deputy Barton that he thought he saw a shooting. But Saldivar said he was “messed up at the time.” He denied saying he saw the shooter. When he was interviewed by Deputy Barton, Saldivar may have mentioned Pena’s name.⁴

Saldivar denied telling Deputy Barton that he received a threatening phone call from Waldo, Perez’s cousin, or that Waldo said, “Hey, Minor says you’d better disappear.” After the July 7, 2004 preliminary hearing, Saldivar moved away from his old neighborhood.

Perez

On the date of the shooting, Perez went to his mother’s house to watch a football game and a soccer game. He drank beer that day, and when asked how many he drank, he stated, “Maybe like four, four-and-a-half, four.” Perez was asked to identify Pena in court. Perez responded, “I can’t make out his face” and noted that it had been a long time since he had seen Pena and Pena had probably changed. Pena was brought closer to the witness stand, but Perez was still unable to make an identification.

Perez was asked: “Do you see the person that shot you in court today.” Response: “I can’t—my vision is—I can’t tell—I can’t see the faces.” When asked whether he could see people’s faces, he said, “Well, not from—I’m nearsighted. So I just see them blurry, hazy.”

Magdaleno was escorted up to the witness stand.

Perez stated: “I don’t remember this guy.”

Detective Mark Brooks of the Los Angeles County Sheriff’s Department interviewed Perez at the hospital on January 20, 2004. At the time, Perez had several tubes and machines hooked up to his body. Perez informed Detective Brooks that on the

⁴ Saldivar knew Pena as “Kiki.”

night of the shooting two people rode up to him on a bicycle. The shooter wore a black hooded sweatshirt, he was 25 to 28 years old, and weighed 180 to 200 pounds. Additionally, Perez informed Detective Brooks that the shooter had a shaved head and no visible tattoos.

On January 26, 2004, Detective Brooks showed Perez some photographs and gave him an admonition form. Perez read and understood the written admonition. He hesitated before making an identification. He narrowed it down to two photographs. Eventually, he pointed to Magdaleno's picture. Detective Brooks asked Perez some questions, but Perez testified that he did not remember "a lot of stuff" because he was "under medication." He had a chest tube and was on morphine for pain.

Perez circled Magdaleno's picture.

When asked why he identified Magdaleno, Perez said, "That was the closest picture that I got—That I tried to remember the face." Perez admitted that he was told he did not have to identify anyone, but then stated, "I don't think I should have circled any of them." He claimed that on January 26, 2004, he was not a 100 percent sure of his identification.

During cross-examination, Perez reiterated that he was uncertain as to whether the shooter was in the photographic six-pack. He was then asked if the police encouraged him to pick one. According to Perez, Detective Brooks "pointed at the one that I circled and said, 'Are you sure it's not this guy?'"

On March 11, 2004, Perez went to a live line-up at the central jail. He did not make an identification. After the live line-up, Perez spoke to the prosecutor and Detective Brooks about his fears regarding testifying. Perez told Detective Brooks that he was afraid. On the stand, Perez was asked if he was afraid to testify. He said he was afraid of being in court because it made him nervous. However, he did not think anything bad would happen to him just because he testified. His family was afraid due to the shooting and tried to move out of the area. He told Detective Brooks that he feels, or his family makes him feel, as though he is responsible for their fear.

Perez was asked if he told Detective Brooks that he actually did recognize the shooter at the live line-up. Response: “Well, maybe I thought of maybe a possible person, but I couldn’t believe myself because I felt betrayed by my eyes because I can’t really see that far. I need glasses, but I don’t have the income to buy them.” Perez explained that he is nearsighted.

According to Perez, he was shot from about 10 feet away.

The prosecutor stood behind Magdaleno and asked if Perez remembered identifying him at the preliminary hearing. Perez said, “I remember identifying a person, but I don’t know if this is the same person.”

The prosecutor read some of the transcript from the preliminary hearing. Perez testified that he remembered saying “yes” to the question, “When you went to [the] live line-up, did you recognize anyone?” He recalled that at the preliminary hearing he admitted that he did not identify anyone at the live line-up because he was afraid for his family and himself. At the preliminary hearing, Perez stated that he recognized Magdaleno right away.

On cross-examination, it came out that there was only one person in an orange jumpsuit present during the preliminary hearing. Perez stated that when he was asked to point at the shooter he pointed at the person in the orange jumpsuit. He felt as though he had no choice but to point at the person in the orange jumpsuit because otherwise he could go to jail.

Perez was asked about when the prosecutor took him to the scene of the crime. Perez admitted that he was afraid and that he did not want to get out of the car. After that, he told the prosecutor and Detective Brooks that he did not want to go through with the case.

The prosecutor asked: “And you kept emphasizing how scared you were; is that fair to say?” Response: “Well, I wasn’t—because I’m not sure. I don’t want to incriminate the wrong person.” Pressing on, the prosecutor suggested that Perez was sure when he circled Magdaleno’s photograph at the hospital. “No,” said Perez. “I still wasn’t sure. That’s why I shouldn’t have circled it.” The prosecutor asserted that this

was the first time Perez suggested he was confused as to whether Magdaleno was the right person. To this, Perez stated, “Well, I always had my doubts.”

Perez denied being told by anyone not to testify.

On cross-examination, he was asked if any police officers told him he might get in trouble if he did not testify. Answer: “Well, No. Well, what happened is that—since I circled [Magdaleno’s] name at the hospital, I thought that—that if I said—since I don’t recall, if I said that, I was going to go to jail for [false] imprisonment.” Perez was asked if he circled Magdaleno’s name, even though he was not sure, because he felt he would get in trouble. Perez said, “Yes. I felt that I had to go through with—with it being the guy.” Perez stated that before the preliminary hearing “they told me about going to jail.” His understanding was that he might go to jail if he did not testify.

May Santos

The prosecutor called his former supervisor, May Santos (Santos), a deputy district attorney with 17 years of experience. She testified that she met with Perez in March 2004 and he was nervous and scared. She denied ever threatening to have Perez arrested or locked up. In her view, Perez was reluctant to talk about the shooting.

Deputy Barton

Deputy Barton was called to testify as a gang expert. Deputy Barton explained that Magdaleno has various monikers, including Minor, Grumpy and Beto. Other law enforcement officers knew Magdaleno as Minor. There is only one person from the Eastside Paramount Gang with that moniker. From November 2003 to January 2004, Deputy Barton received complaints that two people known as Minor and Little Minor (or Minor II) were trying to recruit people into gangs. Pena is Little Minor.

After the shooting, in January 2004, Deputy Barton arrested Saldivar for marijuana possession. Saldivar stated that on January 18, 2004, he was approached by Minor and Little Minor. They tried to “jump” Saldivar into the Eastside Paramount Gang. Magdaleno (Minor) lifted up his shirt and showed a handgun in his waistband. They were aggressive but then backed down and went to contact Perez. Saldivar heard

Pena say, “Just do him. Just get him. Do him. Waste him.” At that point, Magdaleno took out the handgun and shot Perez in the chest.

When Saldivar was presented with photographs and asked to identify who was involved in the shooting, he circled the photographs of Magdaleno and Pena. Saldivar said he was afraid to testify. He was “really scared” going into the preliminary hearing. He kept saying, “They’re going to kill my family.” According to Deputy Barton, he was told by Saldivar that a person named Waldo called on Magdaleno’s behalf and told Saldivar to disappear. Saldivar thought his sisters would be killed.

Sergeant Robert Frank Windrim

Sergeant Robert Frank Windrim of the Los Angeles County Sheriff’s Department supervises the Lakewood Gang Unit. He testified that he went to the hospital with Detective Brooks to see Perez on January 26, 2004. Perez looked at the photographic six-pack for 25 to 30 seconds. Detective Brooks asked if Perez saw someone he recognized, and Perez said it was between numbers two and four. He said that they looked alike. In Sergeant Windrim’s view, the two pictures did not look similar. Detective Brooks asked Perez if something was wrong and he said he was afraid for his family. He was told he would be protected, and he said he wanted to see the photographs again. At that point, he immediately pointed to the fourth picture and said, “This is the guy that shot me.” Detective Brooks asked Perez if he was sure. He said yes. At no point in time did Detective Brooks point to a picture in the photographic six-pack and ask if Perez was sure that was not the shooter.

Though Perez was in the hospital, he had all of his faculties and was able to answer questions.

Detective Brooks

At the time of trial, Detective Brooks was assigned to Operation Safe Streets, a specialized unit that investigates violent gang crime. He identified Pena when he was brought into court and stated that Pena, a member of Eastside Paramount, is known as Kiki, Minor II and Little Minor. On January 20, 2004, Perez told Detective Brooks that the shooter was approximately five-feet-eight inches tall, 180 to 200 pounds, and about

25 to 28 years of age. According to Perez, the shooter was wearing a baggy, black sweatshirt and had a large black handgun. Perez said that he would be able to identify the shooter.

Detective Brooks checked the moniker “Minor” in intelligence files pertaining to Eastside Paramount and discovered that it belonged to Magdaleno. He found a photograph of Magdaleno but noticed that there was a tattoo over his right eye. Before creating a photographic six-pack, Detective Brooks had the photograph manipulated so the tattoo was removed.

When asked why he had the tattoo removed, he stated: “Well, one of the reasons is because . . . I asked [Perez] if there was anything specific that would identify the individual, tattoos, scars, anything like that, and he said there were not. He didn’t see any. Based on that . . . , to make the line-up as fair as possible, I had it removed. Therefore, it wouldn’t prejudice him in the line-up.” Regarding how it would prejudice Magdaleno, Detective Brooks opined that “the individual . . . might be looking for somebody from [Eastside Paramount] specifically, and he’s the only individual I find with that type of tattoo, then all he’s got to do is look for the letters ESP, and he’s just going [to] pick that individual out because of the tattoo.” Detective Brooks wanted Perez to pick the suspect out because of facial features because they “generally don’t change.”

On January 26, 2004, after Sergeant Windrim explained that there were things that could be done to provide Perez and his family protection, Perez identified Magdaleno in the photographic six-pack.

To make everyone in the live lineup look the same, Detective Brooks put band-aids on the right side of their faces.

Perez did not identify anyone at the live line-up. Afterwards, Perez said he was afraid to make an identification and testify. Neither Detective Brooks nor Santos threatened Perez with arrest or lock-up if he refused to identify a particular person. In a later conversation, Perez stated that he did in fact recognize the shooter at the live line-up.

At the preliminary hearing, Perez identified Magdaleno as the shooter.

Detective Brooks called Perez to tell him when the trial would be starting. Perez said he did not want to proceed. Detective Brooks explained that Perez's subpoena obligated him to appear. Moments later, Perez's wife called and Detective Brooks again explained that Perez was under subpoena. During those conversations either Perez or his wife or both indicated that they would claim that Detective Brooks intimidated or threatened Perez.

Just before Perez testified he started saying that he was unsure whether Magdaleno was the shooter. This was different from what Perez had said in the past. Prior to that, Perez had no doubts. During that last conversation, Perez alleged that Detective Brooks and the prosecutor threatened to have him arrested and put in the same cell with Magdaleno.

Detective Brooks and the prosecutor also spoke to Saldivar. He said he was afraid of retaliation toward members of his family. According to Saldivar, he received a threat from Waldo two weeks prior to trial. Saldivar said his plan was to state that he did not know who shot Perez. After Saldivar testified, during a noon break, he told Detective Brooks that he recognized Magdaleno and that Magdaleno was Minor, the person who shot Perez.

On cross-examination, Detective Brooks testified that Magdaleno and Pena were staying in the same house. A black sweatshirt with a hood that matched the description of the sweatshirt worn by the shooter was found in Pena's room. There was graffiti on Pena's wall that said Baby and Little M. According to Detective Brooks, the "M" stood for Minor. A search of Magdaleno's room failed to reveal a sweatshirt. Similarly, Detective Brooks found no evidence at Magdaleno's parents' house.

The jury found Magdaleno guilty of the attempted murder of Perez. Magdaleno was sentenced to prison.

This timely appeal followed.

DISCUSSION

I. Identification by Perez.

Magdaleno contends that the trial court violated his right to a fair trial and due process by permitting evidence of his identification by Perez. We disagree. Based on the totality of the circumstances, the identification was reliable. And even assuming that the trial court erred, reversal is not called for. Error, if any, was harmless beyond a reasonable doubt because Saldivar independently informed the investigating officers that Magdaleno was the shooter.

A. The right to a fair trial.

A defendant charged with committing a crime is entitled to a fair trial, but this does not mean that the Constitution requires that the trial be perfect. (*Bruton v. United States* (1968) 391 U.S. 123, 135.) When a defendant is deprived of the inviolate right to a threshold level of fairness, the error must be subjected to the rigors of analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). A trial defect—an error pertaining to the presentation of the case to the jury—must be reversed unless the error was harmless beyond a reasonable doubt. (*Ibid.*) A structural defect—an error that affects the framework of a trial—requires automatic reversal. (*People v. Woodward* (1992) 4 Cal.4th 376, 387.)

B. The right to due process in connection with an identification procedure.

“In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) “The defendant bears the burden of demonstrating the existence of an unreliable identification

procedure. [Citations.]” (*Cunningham, supra*, at pp. 989–990.) Ultimately, the issue is whether there was “a ‘substantial likelihood of irreparable misidentification’ under the “‘totality of the circumstances.’”” (*Id.* at p. 990.)

Typically, an improper identification procedure occurs when the police single out one person and direct the witness’ attention to some element that was connected with the crime, such as the suspect’s unique appearance or clothing similar to the suspect’s clothing. (*Rudd v. State of Florida* (4th Cir. 1973) 477 F.2d 805, 811.) “Impermissible singling out does not necessarily occur, however, when the police attempt to reenact the atmosphere of the crime by having all subjects wear clothing similar to that worn by the bandit, or by having only two or three of the subjects wear similar clothing if the witness has already narrowed his choice to those two or three subjects. To the contrary, reenactment of crime atmosphere is often the preferred identification procedure. Wigmore suggests: [¶] At the time of *presenting for recognition*, whether upon arrest or at trial in the courtroom, measures should be taken to increase the stimulus of association and to decrease the risk of false suggestion. (a) The person to be identified should be clothed and placed (so far as feasible) in the same conditions as when originally observed. (b) The person to be identified should be presented in company with a dozen others of not too dissimilar personalities.” (*Ibid.*)

When photographs in a photographic lineup are altered, we focus on whether the alteration increased or decreased the reliability of a witness’ identification of the defendant. In *United States v. Dunbar* (3rd Cir. 1985) 767 F.2d 72, a man wearing a beard and cap robbed a bank. The police showed two tellers multiple photographs, each retouched to show a person with a beard and cap, and they identified the defendant. The defendant unsuccessfully moved to suppress the photographic identifications and subsequent in-court identifications. The court held that because each photograph was altered in the same way, the alteration increased the reliability of the tellers’ identifications. (*Id.* at p. 74.)

If a defendant was deprived of due process, the error is subject to analysis under the *Chapman* standard.

Factual determinations by the trial court must be upheld if they are supported by substantial evidence. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 38.) Still, “[i]t is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominantly legal mixed question) and, as such, subject to review de novo.” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216.) We need not resolve this issue. Regardless of the standard of review, we must affirm.

C. The identification did not violate Magdaleno’s right to due process; even if there was error, it was harmless.

To preserve a due process issue for appeal, a criminal defendant must object at the time of trial. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Magdaleno does not contend that he objected to Perez’s identification evidence. We note that at the preliminary hearing Perez identified Magdaleno and there was no objection. Neither was there an objection to the testimony given by Sergeant Windrim and Detective Brooks regarding Perez’s January 26, 2004 identification. Ostensibly, then, the doors to the appellate courthouse are closed to Magdaleno’s contention that his right to due process was violated by the identification procedure.

Our analysis could stop here.

We note that the digital removal of the tattoo from Magdaleno’s face resulted in a photograph that was less likely to stand because he was no longer identified with the announced gang of the shooter, and because it made him look more like the others in the photographic six-pack. This procedure resulted in an identification that was more reliable. Additionally, we note that Perez had an ample opportunity to view Magdaleno at the time of the offense. They had a brief conversation prior to the shooting. Though Perez recanted his identification at trial, there was sufficient evidence of his prior identification to support a finding that he did in fact identify Magdaleno. And when he made the initial identification, he exhibited certainty once he was assured that he could be protected. He also exhibited certainty at the preliminary hearing. Only eight days lapsed between the incident and the first identification. Thus, even if the procedure had been

unduly suggestive and unnecessary, the totality of the circumstances show that the identification was reliable.

Were we to find error, we would conclude that it was harmless beyond a reasonable doubt. Saldivar independently identified Magdaleno as the shooter, and there was evidence that Magdaleno was “Minor” from Eastside Paramount, the moniker announced by the shooter at the time of the incident.

II. The right to confrontation.

According to Magdaleno, the trial court should not have permitted hearsay statements that were admitted via Deputy Barton, the People’s gang expert. Upon review, we conclude that there is no basis for reversal.

A. The applicable law.

In *Ohio v. Roberts* (1980) 448 U.S. 56, 66, our country’s high court held that an unavailable witness’s hearsay statement could be admitted without violating the Sixth Amendment’s confrontation clause if the statement bore adequate indicia of reliability—if it either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. That rule was altered in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Under *Crawford*, if a hearsay statement offered for its truth was testimonial in nature, its admission violates the confrontation clause contained in the United States Constitution unless the defendant had a prior opportunity to cross-examine the unavailable declarant. (*People v. Price* (2004) 120 Cal.App.4th 224, 237-238.) However, *Crawford* error is subject to harmless error analysis under the *Chapman* standard. (See *People v. Song* (2004) 124 Cal.App.4th 973, 985; *U.S. v. Rashid* (8th Cir. 2004) 383 F.3d 769, 776.)

B. The evidence.

Deputy Barton testified that Magdaleno has previously been identified as “Minor” in connection with other incidents. According to Deputy Barton, a “Deputy Deleon” contacted Magdaleno and “he admitted he was [an] Eastside Paramount gang member with Minor as his moniker.” Deputy Barton further testified that “people” or “kids” were saying that “Minor” and “Little Minor” had tried to recruit them into Eastside Paramount.

C. Magdaleno waived his objection to Deputy Barton's testimony; even if there was error, it was harmless.

Magdaleno does not aver that he objected to Deputy Barton's testimony. A review of Magdaleno's record citations reveal that he chose not to object. Accordingly, he waived any objection and cannot belatedly challenge Deputy Barton's testimony on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 321.)

Even if statements made by out-of-court declarants were testimonial and the right to confrontation was transgressed, any error was harmless beyond a reasonable doubt. Magdaleno's membership in a gang was corroborated by his statement at the time of the shooting that his moniker was "Minor" and he was from Eastside Paramount. Moreover, he has an Eastside Paramount tattoo above his right eye. Finally, Saldivar, who was subject to cross-examination, told Deputy Barton that Magdaleno (Minor) had tried to recruit him into Eastside Paramount.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ